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No. 09-1366

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

MIHAE LEE and JUNGIL LEE,

Petitioners,

v.

WILLIAM J. POLICASTRO, TYRONE M. McDONNELL, KALEBIC, POLICASTRO & D'AMICO, and KALEBIC, POLICASTRO & McDONNELL, and CHANG JOON AN, CHANG MI KIM, SEUNG WHAN KIM, AN & KIM REALTY, HY DESIGN REALTY CORP. and MAURIZIO VALENTINO, INC. and JOHN J. IDOUCHI,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

BRIEF IN OPPOSITION FOR RESPONDENTS WILLIAM J. POLICASTRO, TYRONE M. McDONNELL, KALEBIC, POLICASTRO & D'AMICO, AND KALEBIC, POLICASTRO & McDONNELL

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QUESTIONS PRESENTED

The Respondents object to Petitioners' Questions Presented and offer the following as the correct focus to be considered on the Petition for writ of certiorari:

I. Whether Petitioners have presented compelling reasons to grant the Petition for violations of their due process rights where this argument was never presented to any Court below.

II. Whether the Petition to overturn the New Jersey Trial Court's Order granting Judgment Notwithstanding the Verdict meets the standard of review under Supreme Court Rule 10.

III. Whether Petitioners have presented compelling reasons to readdress any of the remaining issues decided adversely to them by the New Jersey Trial Court.

LIST OF PARTIES

The applicable parties to this Petition include the Petitioners, Mihae Lee and Jungil Lee, and the Respondents William J. Policastro, Tyrone M. McDonnell, Kalebic, Policastro, Damico and Kalebic, Policastro & McDonnell, and John J. Idouchi. The remaining Defendants and Third Party Defendants have not participated in the appellate process below and are not participants in the Petition or this Opposition.

CORPORATE DISCLOSURE STATEMENT

No corporate Respondent has a parent corporation and there is no publicly held company holding ten percent or more of the stock of any such Respondent.

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INTRODUCTION

Petitioners have presented no "compelling reasons" for the Court to grant their Petition for a writ of certiorari ("Petition"). *See Sup.Ct.R.* 10: "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted *only for compelling reasons*." (emphasis added) In this case, none of the three exemplary grounds for granting a writ of certiorari set forth in Supreme Court's Rules are applicable. There is no United States Court of Appeals decision impacted. Similarly, no state court of last resort has decided an important federal question in a way which conflicts with the decision of any other state court. Finally, no state court or United States Court of Appeals has addressed any important question of federal law which requires settling by this Honorable Court.

As set forth herein, Petitioners seek certiorari in an otherwise unremarkable legal malpractice case to review a series of New Jersey state court rulings including the Trial Court's grant of Judgment Notwithstanding the Verdict ("JNOV") in favor of the Respondents following a jury's verdict in favor of the Petitioners in the amount of $100,000.00. That JNOV was upheld by the New Jersey Appellate Division in a written opinion attached to Petitioners' Appendix submitted in support of the Petition. All of the Petitioners' other arguments raised below were found by the Appellate Division to be without sufficient merit to warrant further discussion in a written opinion. The New Jersey Supreme Court declined further review.

As explained herein, the underlying Trial was a simple matter where the Petitioners needed expert testimony at Trial on the issue of proximate cause to prove the elements of their claim. However, the Petitioners' own expert conceded explicitly that there was no connection between the Respondents' alleged negligence and any damage caused to the Petitioners. Because the issue of necessary expert testimony does not remotely meet any of the exemplary grounds in *Sup.Ct.R.* 10, the Petition should be denied.

Nor have the Petitioners presented any other "compelling reason" for this Court to consider this matter further. Specifically, Petitioners: (1) have raised a due process argument which was never presented to any Court below and should not be considered by this Honorable Court; (2) have failed to demonstrate that the Trial Court's Order granting judgment notwithstanding the verdict was improper in any way, thereby invoking the Court's powers to grant the Petition under *Sup.Ct.R.* 10; and (3) have been unable to date, and cannot today, articulate any valid reason to overturn any of the remaining issues decided adversely to the Petitioners by the New Jersey Trial Courts below.

COUNTERSTATEMENT OF THE CASE

This matter involves claims of legal malpractice against the Respondents arising from their representation of the Petitioners in connection with a series of commercial matters involving the Petitioners and their business dealings with others, including the defendants who did not participate in the litigation below.

In 1994, Petitioner Jungil Lee joined a furniture importation business called Hy Design Office Furniture ("Hy Design"), as Vice President. This was a family business owned by Seung Whan Kim, husband of Chang Mi Kim. The Kims were introduced to Mr. Lee by his wife, Petitioner Mihae Lee, and her parents, and were relatives of Mrs. Lee. Hy Design was related to Hy Design Realty, a company whose owners included the defendant below, Chang Joo An, who had a relationship with Korea First Bank ("KFB"). Mr. Lee knew Mr. An before he began to work at Hy Design.

On January 25, 1995, Mr. and Mrs. Lee agreed to secure a line of credit extended to Hy Design from KFB whereby the Lees gave a second mortgage on their home located in Cresskill, New Jersey to KFB. Mr. Lee also personally guaranteed $1.8 million in loans made by KFB to Hy Design. Mr. Lee knew then that KFB had already provided funding to Hy Design and held first and second mortgages on its warehouse property located in Fort Lee, New Jersey (the "Fort Lee Property"). Mr. Lee also invested $300,000 in cash and $500,000 in property in Hy Design. He did not do any investigation before making this investment. He received no ownership interest in Hy Design as a result of this investment, and nothing in writing to evidence this investment. He did not then retain any attorney to protect his interests.

Mr. Lee soon became disillusioned with Hy Design's financial situation and its relationship with KFB. By August, 1995, Mr. Lee had left Hy Design, but KFB refused to remove him as guarantor.

Well after Mr. Lee left Hy Design, KFB commenced a foreclosure suit against the Fort Lee Property on May 5, 1997. According to the foreclosure Complaint, Hy Design then owed KFB $3,086,613.93 on the first mortgage and $1,334,007.56 on the second mortgage. There was not enough equity in the Fort Lee Property to satisfy these amounts. KFB also filed a Notice of *lis pendens* against the Fort Lee Property on May 23, 1997.

At or around the same time, Mr. Lee, for the first time, sought to secure his investment in Hy Design. In the spring of 1997, he heard that the Fort Lee Property might be sold. The Lees then retained Third-party Defendant, John Idouchi, Esq., to record a Third Mortgage on the Fort Lee Property in their favor (the "Third Mortgage") in the amount of $500,000. That mortgage was recorded on June 10, 1997. This was *after* KFB commenced its foreclosure action against Hy Design and *after* it filed a Notice of *lis pendens* against the Fort Lee Property.

After KFB instituted foreclosure proceedings, the Kims approached the Respondents, through William J. Policastro, to represent their interests and the interests of Hy Design. At that time, Mr. Policastro was only aware that there were two mortgages on the Fort Lee property. He first learned of the Third Mortgage while continuing to investigate whether a work out of Hy Design's obligations was feasible. He was surprised to learn of this and contacted Mrs. Kim, who told him that the mortgagee was a family member and there would be no problem removing the mortgage of record.

Thereafter, on July 23, 1997, KFB commenced a separate foreclosure suit against the Lees' Cresskill residence. The Respondents were then introduced to the Lees by the Kims because they were negotiating the loan default work out for Hy Design. Mrs. Kim had told Mr. Policastro that the Lees also wanted to discuss their home foreclosure with him. Prior to their first meeting, Mr. Policastro, Mrs. Lee and Mrs. Kim had a telephone call during which it was disclosed that the attorney defendants were already representing the Kims. On August 25, 1997, Mr. Policastro met plaintiffs to discuss he and his firm's representing them in their foreclosure proceedings. Mr. Policastro disclosed to all parties the possibility of a potential conflict if the Lees' and the Kims' interests diverged.

Meanwhile, Hy Design found a potential buyer, Richard Steier. The Respondents learned of this potential buyer in July 1997 through Mrs. Kim. At that time, the Respondents also became aware of an agreement between Mr. Steier and Mr. An which showed that Mr. An had a financial interest in the Fort Lee Property.

Eventually, a Purchase Agreement dated September 16, 1997 was signed for the sale of the Fort Lee Property by Hy Design to Mr. Steier. That agreement was subject to certain contingencies based upon the Purchaser's negotiations with KFB.

Shortly before learning of this Agreement, the Respondents also learned that one of Steier's requirements for the contract to purchase the Property was that the Third Mortgage be discharged. In

connection with the representation of Hy Design and in order to effectuate the sale as part of the work out for which he had been retained, Mr. Policastro again spoke with Mrs. Kim who confirmed that the Lees would agree to discharge the Third Mortgage. Mrs. Kim later requested that a Discharge of Mortgage be prepared.

At or about that time, defendant Chang Joo An, whom the Respondents had now learned held a financial stake in the Fort Lee Property, agreed to pay $200,000 in the future in exchange for the discharge of Petitioners' Third Mortgage. On September 16, 1997, Petitioners and Mr. An entered into a contract known as the "Side Agreement," which provided that in exchange for a $200,000 payment from Mr. An "from the purchase of the property at the closing," Petitioners would immediately discharge the Third Mortgage. Mr. Lee believed then that the closing was going to happen *after* September 16, 1997. The Side Agreement did not say that anything would be held in escrow. Despite that, Mr. Lee understood that he was releasing his mortgage that day.

Mr. An had communicated the information contained in the Side Agreement directly to Mr. Lee. The Respondents did not negotiate the Side Agreement. Mr. An brought the terms to Mr. Policastro's colleague, Tyrone McDonnell on a green piece of paper and Mr. McDonnell arranged to have it typed. Mr. McDonnell did not alter the agreement's terms before he faxed it to the Lees.

At all times during the Side Agreement transaction, Petitioners received advice from Mr. Idouchi, who had

prepared and recorded the Third Mortgage. In particular, on September 16, 1997, the Kims faxed a draft of the agreement to Mr. Lee, who, in turn, faxed it to "John" and asked him to "please review" it. Further, on the next day, Mr. Lee sent Idouchi a signed version of the Side Agreement with his handwritten note on top that is partly illegible, but states:

> "John:
>
> I asked him [referring to Tyrone McDonnell] to insert 'Automatically- to original Status.' Mr. An (buyer) gave a contract last night. Please do not waste your time [then the illegible part] for your new draft. Thank You."

In the meantime, while Mr. Steier proceeded to satisfy terms of his Purchase Agreement, the KFB foreclosure action against the Fort Lee Property continued.[1] A Final Judgment of foreclosure was entered on August 19, 1998.

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1. A second agreement dated April 29, 1998 was also signed between Steier and Hy Realty and the Kims whereby Steier would buy the mortgage given by Hy Realty and the Kims on the Fort Lee property. As part of the agreement, Steier also agreed to pay the Respondents' legal fees then owed by the Kims and Hy Realty in connection with the entire transaction and workout. Prior to trial, the Respondents successfully moved to bar evidence of the fee arrangement (which the Petitioners repeatedly and improperly refer to as "bribery") at trial. The Trial Court agreed that evidence of the fee structure was irrelevant and unfairly prejudicial in light of the issues involved at trial.

On September 9, 1998, the Discharge of Mortgage that Petitioners signed on September 16, 1997 in relation to the Property and in conjunction with the Side Agreement was recorded in Bergen County.

The closing on the Property took place between Hy Design, KFB and Steier in October, 1998. Title passed without any need to address the now discharged Third Mortgage. At trial, Petitioners proffered the expert testimony of George Conk, Esq. While he testified that the Respondents were in a conflict of interest and were negligent in their handling of the Side Agreement, Mr. Conk made the following critical concessions on cross-examination:

> A: Once the judgment of foreclosure has been entered by First Korea or its successor in interest which is Steier or whatever corporation he formed with partner, then there is no longer a mortgage lien by virtue of the judgment, but there remains the obligation under the side agreement.
>
> * * *
>
> Q: Basically, when the final judgment of foreclosure occurred in August 1998, that mortgage was gone, correct?
>
> A: Yeah. . . .
>
> * * *

> Q: So after August of 1998, they [Lees], could not have revived any mortgage, correct?
>
> A: That original mortgage could not be restored . . . Because the Judgment of foreclosure extinguishes the mortgage.

When the trial court later heard post trial motions, it found that KFB, having filed the foreclosure proceedings and a Notice of *lis pendens* prior to Petitioners' recordation of the Third Mortgage, were not required to name Petitioners in the foreclosure proceedings. The Court explained that the Petitioners were bound by the August 1998 judgment of foreclosure and, further, that their Third Mortgage was extinguished.

The Court further found that:

> It was the foreclosure judgment of August 1998 that extinguished plaintiffs' mortgage rights, not the filing of the signed discharge pursuant to the Side Agreement which occurred 12 days later. Thus, as a matter of law, accepting all evidence and inferences in favor of plaintiffs, plaintiffs could not sustain this legal malpractice action as the defendants' alleged negligence relating to the Side Agreement, and their alleged failure to escrow the discharge of mortgage until the $200,000 payment was received, could not have been a proximate cause of any damages sustained by plaintiff.

The Court continued:

> The Court finds that plaintiffs' rights and remedies were not affected by the alleged negligence of the defendants, as the Third Mortgage was extinguished by the foreclosure judgment of the first and second mortgages; however, the obligation of An under the Side Agreement remained.

Because the Court found that Petitioners' liability expert could not establish the requisite nexus between negligence and proximate causation, it granted JNOV, concluding that "reasonable minds could not differ on the issue of whether the absence of an escrow provision in the Side Agreement was a proximate cause of the loss of plaintiffs' mortgage interest and rights under said agreement."

The Appellate Division agreed and affirmed the Trial Court's well reasoned decision. Specifically, the Appellate Division agreed that the foreclosure judgment extinguished any liens that existed on the property after its entry, including Petitioners' third mortgage. Accordingly, the conduct of the Respondents could not have been and was not a proximate cause of harm to the Petitioners.

REASONS FOR DENYING THE PETITION

Although the Respondents recognize the broad powers of this Court to grant writs of certiorari in appropriate cases, they respectfully submit that this matter does not rise to the level of the "character" of the case envisioned by *Sup.Ct.R.* 10. Petitioners have not identified any conflict between the United States Courts of Appeals, nor have they raised any unsettled federal question that has not been decided by this Court. Instead, Petitioners divert their focus from the lack of proximate cause which was ultimately fatal to their state court claim and instead ask the Court to focus on a due process argument in an ostensible effort to raise an "important question of federal law," which, as explained herein, was never raised below and is nevertheless insufficient to warrant this Court's consideration. Finally, none of the secondary arguments presented by the Petitioners, all of which were reserved to the state trial court's discretion, support the granting of the Petition in this case.

I. PETITIONERS' DUE PROCESS ARGUMENTS WERE NOT RAISED BELOW AND SHOULD NOT BE CONSIDERED BY THIS COURT

Petitioners first assert that they were denied "due process" by the New Jersey Trial Court's "invalidation" of a jury verdict in their favor. As a preliminary matter, the question of Petitioners' due process rights was never presented to the New Jersey Trial Court, the Appellate Division, or the New Jersey Supreme Court and is improperly raised before this Court. In *Ellis v. Dixon*, 349 U.S. 458, 76 S. Ct. 850, 99 L.Ed. 1231, *rehearing*

denied; 350 U.S. 855, 76 S. Ct. 855, 100 L.Ed. 769 (1955), this Court clearly articulated that questions not raised below were not open for the Court's consideration of Petitions for writs of certiorari.

In *Ellis*, the Court framed the question before it as follows:

> The constitutional questions involved are whether respondents, members of the Yonkers Board of Education, in refusing the use of any of the Yonkers public school buildings to the Yonkers Committee for Peace for a forum on "peace and war," discriminated against the Committee, so as to deprive the Committee's members of their rights of freedom of speech, assembly, and equal protection of the laws, under the First and Fourteenth Amendments.

349 U.S. at 459, 75 S. Ct. at 852, 99 L.Ed. at 1234.

The Court explicitly found that "the question of whether the regulations are unconstitutionally vague was not raised below, and hence is not open here." 349 U.S. at 460, 75 S. Ct. at 252, 99 L.Ed. at 1234. Similarly, the question of whether the Petitioners' due process rights were violated under the United States Constitution was never raised below and is not an open question before this Court. This is consistent with New Jersey decisional law, as the Petitioners are aware, since the same concept was briefed to the New Jersey Supreme Court below. In that venue, the Petitioners attempted to raise the issue of novation as a new theory

in the case, against which the Respondents argued that New Jersey case law is clear that Appellate Courts will generally not consider material which is not raised below. *N.J.Ct.R.* 2:5-4; *Richardson v. Standard Guar. Ins. Co.*, 371 N.J.Super. 449 (App. Div. 2004); *Triffin v. Somerset Valley Bank*, 343 N.J. Super. 73 (App. Div. (2001); *In re Kovalsky*, 195 N.J. Super. 91 (App. Div. 1984). Respectfully, because the doctrine of novation was never presented to the Courts below, it was not properly raised to the New Jersey Supreme Court, just as the issue of due process is not properly raised here.

Even if properly before this Court, Petitioners have not presented proof that their due process rights were in any way impacted by the actions of the State Courts below. Judgments Notwithstanding the Verdict are permissible under New Jersey State law and Petitioners cite no authority that this procedure violates any "due process" rights of any litigant.

N.J.Ct.R. 4:40-2(b) provides:

> 4:40-2. Reservation of Decision on Motion; Motion for Judgment Notwithstanding the Verdict
>
> * * *
>
> (b) Renewal of Motion. If a motion for judgment is denied and the case submitted to the jury, the motion may be renewed in accordance with the procedure prescribed by R. 4:49-1 (new trial) within 20 days after the verdict or the jury's discharge. A motion so

> renewed may include in the alternative a motion for a new trial, and every motion made by a party for a new trial shall be deemed to include, in the alternative, a renewal of any motion for judgment made by that party at the close of the evidence. If the motion is granted on renewal thereof, the court shall nevertheless rule on the motion for a new trial determining whether it should be granted if the judgment is thereafter reversed or vacated. Briefs shall be submitted with the renewal of the motion for judgment. Failure to renew the motion shall not preclude appellate review of the denial of the motion made at trial.

All motions for judgment, whether made under *N.J.Ct.R.* 4:37-2(b) at the close of the plaintiff's case, under *N.J.Ct.R.* 4:40-1 at the close of evidence, or under *N.J.Ct.R.* 4:40-2(b) after the verdict, are governed by the same standard: If, accepting as true all the evidence which supports the position of the party defending against the motion and according him the benefit of all inferences which can reasonably and legitimately be deduced therefrom, reasonable minds could differ, the motion must be denied. This standard applies both at trial and on appeal. *Boyle v. Ford Motor Co.*, 399 N.J. Super. 18, 34 (2008).

In this case, the Petitioners cite no authority for the proposition that New Jersey's JNOV mechanism is unconstitutional, *per se*. Instead, they revert to the tired argument that the trial court simply misapplied the applicable standard and usurped the function of the jury.

This is where they allege that they were denied due process: because the Court below disagreed with what they wanted to be the ultimate result. But the Petitioners ignore the critical question of proximate cause and the inescapable fact that nothing the Respondents did or did not do could have changed the end result. As set forth in Point II, below, because the lack of a proximate causal connection was fatal to their claim (as conceded by their own expert), the Petitioners' contentions are meritless.

II. PETITIONERS' OBJECTION TO THE TRIAL COURT'S ORDER GRANTING JUDGMENT NOTWITHSTANDING THE VERDICT CANNOT BE SUSTAINED

As the Trial Court recognized in its written opinion addressing the JNOV motions, the essential elements of a cause of action for legal malpractice in New Jersey are: (1) the existence of an attorney-client relationship creating a duty of care upon the attorney; (2) the breach of such duty; (3) proximate causation between the breach and injury to the plaintiff; and (4) actual damages to the plaintiff. *Sommers v. McKinney*, 287 N.J. Super. 1, 10 (App. Div. 1996); *Zendell v. Newport Oil Corporation*, 226 N.J. Super. 431, 438 (App. Div. 1988); *Albright v. Burns*, 206 N.J. Super 625, 632 (App. Div. 1986).

Further, "an attorney is only responsible for a client's loss if that loss is proximately caused by the attorney's legal malpractice." *2175 Lemoine Avenue v. Finco, Inc*, 272 N.J. Super. 478, 487 (App. Div. 1994); *see also Gautam v. DeLuca*, 215 N.J. Super. 388, 397

(App. Div. 1987). The test of proximate causation "is satisfied where the negligent conduct is a *substantial contributing factor* in causing the loss." *Id.* (emphasis added); *see also Lamb v. Barbour*, 188 N.J. Super. 6, 12 (App. Div. 1982), *certif. denied*, 93 N.J. 297 (1983). In this regard, "the measure of damages is ordinarily the amount that the client would have received but for the attorney's negligence." *Id.*; *see also Lieberman v. Employers Ins. of Wausau*, 84 N.J. 325, 342 (1980); *Gautam, supra*, 215 N.J. Super. at 397; *Hoppe v. Ranzini*, 158 N.J. Super. 158, 164 (App. Div. 1978).

Because the primary issue in the underlying trial was the Petitioners' claim that the Respondents did not properly represent their interests in connection with the Side Agreement and the related discharge of mortgage by escrowing the discharge before closing, the Petitioners' burden has always been to prove not only negligence, but proximate causation.

As set forth in *Froom v. Perel*, 377 N.J. Super. 298, 315 (App. Div.), *certif. denied* 85 N.J. 267 (2005):

> [I]n cases involving transactional legal malpractice, there must be evidence to establish that the negligence was a substantial factor in bringing about the loss of a gain or benefit from the transaction . . .

As the Appellate Court recognized,

> Where a plaintiff alleges that he suffered a loss in a particular transaction because an attorney failed to take steps to protect his

> interest, the plaintiff must present evidence that, even in the absence of negligence by the attorney, the other parties to the transaction would have recognized plaintiff's interest and plaintiff would have derived a benefit from it.

Id. As the Court below also noted, this proof of proximate causation must have been established by competent expert testimony. "Expert testimony is required when the issue is beyond the common knowledge of laypersons." *Froom*, 377 N.J. Super. at 318.

In granting the Respondents' motion for JNOV, the Trial Court found, and the Appellate Court agreed, that Petitioners were unable to establish that the Respondents proximately caused any damages because their expert conceded the point in his testimony. The damages claimed by Petitioners were caused by multiple factors, none of which were attributable to the Respondents.

Most importantly, pursuant to the standard clearly articulated in *Froom*, Petitioners were unable to prove that they would have achieved a better result had the Respondents acted differently. As the New Jersey Courts below plainly observed, KFB's foreclosure judgment extinguished Petitioners' mortgage rights. Thus, the failure to hold the Discharge of Mortgage in escrow had no consequence since neither the Mortgage nor the Discharge of it were of any further consequence once the Bank's first mortgage was pursued to a foreclosure judgment.

The termination of Petitioners' mortgage rights under the Third Mortgage was also in line with the law in New Jersey. In a "race-notice" jurisdiction such as New Jersey, the party who first records the mortgage instrument will prevail so long as that party had no actual knowledge of the other party's previously acquired interest in the property. *See Cox v. RKA Corp.*, 164 N.J. 487, 496 (2000). Furthermore, parties are generally charged with constructive notice of instruments that are properly recorded. *Id.*

The *lis pendens* statute, *N.J.S.A.* 2A:15-6, et seq., requires that a "notice of lis pendens be filed and recorded for subsequent interest takers to have constructive notice of the pendency of a lawsuit *and to take subordinate to the rights the plaintiff derives in the outcome of the litigation.*" *Manzo v. Shawmut Bank, N.A.*, 291 N.J. Super. 194, 199 (App. Div. 1996) (emphasis added) (citations omitted). Furthermore, pursuant to *N.J.S.A.* 2A:50-30, in any action for foreclosure, where a person claiming an interest in the property has an unrecorded mortgage, that person "shall be bound by the proceedings in the action so far as such property is concerned, in the same manner as if he had been made a party to and appeared in such action, and the judgment therein had been made against him as one of the defendants therein." Thus, if a mortgage is unrecorded prior to "the filing of the [foreclosure] complaint," then pursuant to *N.J.S.A.* 2A:50-30, the holder of the mortgage will be bound by the judgment. *See PNC Bank v. Axelsson*, 373 N.J. Super. 186, 191 (Ch. Div. 2004).

The New Jersey Trial and Appellate Courts agreed that, legally, KFB, having filed the foreclosure proceeding and *lis pendens* in May 1997, prior to the recording of Petitioners' mortgage on June 10, 1997, did not have to name the Petitioners in the foreclosure proceedings. Pursuant to the foreclosure judgment, inferior liens such as the one belonging to the Petitioners were extinguished.

The Petitioners' citation to the *dissenting* opinion in *VRG Corp. v. GKM Realty Corp.*, 135 N.J. 539, 558 (1994) is misplaced since the case involved a dispute regarding real estate commissions and has no bearing on the issues raised here. Likewise, *Tabaac v. Atlantic City*, 174 N.J. Super. 519 (1980) is inapplicable since the issues raised in that matter centered around the approval of the settlement of a city taxpayer's dispute and the "escrow" cited by the Petitioners was a provision in a tangential contract, where the parties had agreed that part of a purchase price would be held in escrow to secure the purchase agreement. The issue here, however, is whether it would have mattered to the Petitioners if their Discharge of Mortgage document had been held in escrow pending the tender of $200,000.00 cash to the Petitioners.

Although the Petitioners maintained below that they were damaged "because defendants tendered the Discharge of Mortgage without securing the consideration therefore, which was $200,000.000. . . ," the failure to escrow the Discharge of Mortgage became a non event as their mortgage rights were extinguished by the foreclosure judgment.

Petitioners' secondary argument that the case did not require expert testimony at all clearly ignores the obligation in New Jersey to support a sophisticated claim of legal malpractice with competent expert testimony (*See, Froom*, 377 N.J. Super. at 318), which their own counsel recognized in tendering the reports of not just one, but two experts. It is respectfully submitted that jurors could not be expected to have appropriate knowledge with respect to the standard of care expected of attorneys in a complex transactional context. Petitioners' citations to blatant medical error cases involving the extraction of a wrong tooth, *Steinke v. Bell*, 32 N.J. Super. 67 (1954), or the failure to properly attend a mother giving birth, *Friel v. Vineyard Obstetrical and Gynecological Prof. Ass'n.*, 166 N.J. Super. 579 (App. Div. 1979), do not provide a parallel.

Accordingly, it is respectfully submitted that no "due process' rights were violated by the Courts below, since the Trial Court simply applied valid New Jersey law to the factual scenario with which it was presented. The Appellate Court and the New Jersey Supreme Court had no grounds to disagree, and did not disagree with that conclusion.

III. PETITIONERS' REMAINING CONTENTIONS ARE MERITLESS

Finally, this Court should not consider any of the remaining issues raised by the Petitioners since they have no federal or constitutional implications whatsoever. Again, the Petitioners raise the flag of "due process" without a pole to support that flag. As such, the remaining contentions of the Petitioners are

unsustainable. To begin with, the continued use of the term "bribery payments" and the suggestion that the Respondents acted impermissibly by accepting payments of their legitimately incurred legal fees is intended to be salacious and inflammatory in order to grab the Court's attention. However, the unprovoked personal attack against the Respondents is unjustified, unsupported by the facts and should not be considered by this Court.

The Trial Court motions were correctly decided

A. The Trial Court correctly ruled that payment of attorneys' fees by a third party was inadmissible

The record below is clear that the payments of attorneys fees referred to are not "bribery," or any other way corrupt or improper. Critically, as the Petitioners concede, neither of their expert witnesses identified any such deviation or alleged misconduct as a cause of damage to the Petitioners. Without expert support, this claim fails as a matter of law. *See, e.g. Froom*, 377 N.J. Super. at 314.

Factually, the Trial Court below ruled that, as part of a negotiated agreement, Mr. Steier simply agreed to pay attorneys fees which were then outstanding and owed by Hy Design and the Kims for work related to that workout. These payments had nothing to do with the Respondents' representation of the Petitioners. Pursuant to *N.J.R.Evid.* 401, this irrelevant evidence had no bearing on how the Respondents represented the Petitioners. The Courts below recognized that fact.

In fact, the Appellate Division specifically found that "the remaining issues raised by plaintiffs are without sufficient merit to warrant further discussion in a written opinion . . . ," (citing *N.J.Ct.R.* 2:11-3(e)(1)(E)).

Finally, the Petitioners raise a number of trial court discretionary decisions regarding pre-trial and trial motions and applications in support of their Petition but cite virtually no authority for the proposition that any of those decisions were improper or, even if so, that they would have changed the ultimate outcome: the concession by Petitioners' expert that there was simply no proximate causal nexus between the Respondents' conduct and the damages suffered by the Petitioners at the hands of others, including their own relatives.

Prior to the underlying trial, the Respondents made several motions *in limine*. Based upon the arguments presented below, the Court's decision on the motions should be upheld.

B. The Trial Court correctly barred evidence of alleged damages relating to Petitioners' South Korean property

Prior to trial, the Respondents moved to bar the introduction of evidence of damages by the Petitioners relating to real property located in Seoul, South Korea. At the eleventh hour, Petitioners attempted to pad their damages claim by alleging losses that were never part of the lawsuit. The Respondents moved to bar evidence of those alleged damages, which the Trial Court correctly granted since the South Korean property had absolutely nothing to do with the allegations of the Complaint which then remained to be tried.

Petitioners' original Complaint, filed in 2003, did not mention the South Korean property; consequently, over the next two years, no discovery was conducted in connection with that foreign holding. Therefore, the Court correctly ruled that the claim for damages relating to the loss of their apartment in Seoul, South Korea was not admissible at trial.

Moreover, there was no expert testimony as to this property. In a report dated January 14, 2006, authored coincidentally by Petitioner Mrs. Lee, Petitioners attempted to proffer evidence as to the purported value of the South Korean apartment. As the Court properly found, Mrs. Lee was not qualified as an expert in the field of real estate appraisal since she had not demonstrated the qualification to offer such testimony pursuant to *N.J.R.Evid.* 702.

C. The Trial Court correctly barred the purported expert report of Petitioner Mihae Lee as to the value of the property located in Cresskill, New Jersey

The Court also barred the report and testimony of Petitioners purported expert Mihae Lee as to the value of property located in Cresskill, New Jersey. Under New Jersey's rules of evidence, testimony by experts is permitted and often required in certain circumstances:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or

> education may testify thereto in the form of an opinion or otherwise.

N.J.R.Evid. 702. The valuation or real property is one circumstance where expert appraisal evidence is required to prove evidence of the value of real property; in other words, it does not fall within the "common knowledge" exception where lay people are permitted to give opinions. *See, e.g. Torres v. Schripps, Inc.*, 342 N.J. Super. 419, 430 (App. Div. 2001) ("[E]xpert testimony is generally needed to determine the market value of real property."); *Jacobitti v. Jacobitti*, 263 N.J. Super. 608, 613 (App. Div. 1993), *affirmed*, 135 N.J. 571 (1994)("We caution trial judges against fixing market value of real property without the benefit of expert appraisal evidence."); *State D.E.P. v. Fairweather*, 298 N.J. Super. 421 (App. Div. 1997)(Expert testimony required as to enhancement of value of real property due to historical significance.). *See also Fagas v. Scott*, 251 N.J. Super. 169, 198 (Court upholds finding of award of fees for expert appraisal whose testimony was accepted by the Court in determining the fair market rental value of certain real property.).

In light of the dearth of evidence supporting her qualifications and the fact that she was not a licensed appraiser (2T.62:18-24), Mrs. Lee's report and testimony regarding the valuation of the Cresskill property were correctly found by the Court to be inadmissible at trial.

D. The Trial Court correctly decided the evidentiary issues raised during trial

The Petitioners take issue with a number of rulings made by the Trial Court while the matter was being litigated. However, other than expressing their displeasure with those rulings, they have cited no actual authority for the proposition that any such ruling, which rests within the sound discretion of the Trial Court, violated any "due process" right Petitioners claim to have.

E. The Dismissal of the fraud claims following trial was proper

At the close of trial, the Trial Court dismissed their claims of fraud and the request for punitive damages. This dismissal was left to the sound discretion of the Trial Court and proper under *N.J.Ct.R.* 4:37-2. The Court carefully considered the proofs at trial and ruled that it could not conceive of any jury reasonably finding that the Respondents' conduct amounted to fraud.

CONCLUSION

For all of the foregoing reasons, Respondents jointly respectfully request that the Court deny the Petition.

Respectfully submitted,

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